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SINGAPORELAWBLOG

Justice As Friendship: Book Review

Dr. Tan Seow Hon's book, *Justice As Friendship: A Theory of Law* (Ashgate, 2015), presents a unique and compelling argument for the proposition that law can be justified by extra-legal moral principles elucidated through the heuristic device of friendship.

Overview of the book

The first part of *Justice As Friendship* demonstrates the need for a legal theory that is internally coherent and that can justify the law through a set of extra-legal moral norms. Dr. Tan begins by highlighting the problems with three groups of theories of law: theories of law that claim to be purely descriptive, theories of law that seek to protect the autonomy of each individual to pursue their conception of the good life, and critical theories of law that suggest law is merely politics. In summary, her critique of the first category of theories is that they are not just descriptive but also evaluative, and are not morally neutral since they would uphold a morally unjust law deemed valid by the theories' tests for law. The second category of theories implicitly apply or rely upon moral norms that their own arguments give them no standing to use. As to the third category, Dr. Tan contends that such theories lack a moral vision that can justify the law and guide its development. She next considers two possible means of deriving moral norms that can justify the law – relying upon law's internal morality or the usage of interest-free positions to determine what is just. However, the issue with such theories is that they necessarily import some form of extra-legal or substantive morality in the elaborations of their theories, despite the fact that these theories were formulated to avoid doing so.

After building a case for the necessity of extra-legal moral norms by which law can be justified, Dr. Tan unveils her main thesis – friendship provides a model for deciphering the claims between the self and the other. Thus, friendship can be used as a heuristic device to discern the principles of justice that should undergird the law. The universality of friendship allows this method of discerning moral principles to avoid the usual controversies surrounding the existence and epistemology of substantive conceptions of morality.

The subsequent chapters flesh out this thesis. As she describes the phenomenon of friendship, Dr. Tan invites the reader to reflect upon one's own intuition and experiences of friendship to affirm the truth of her propositions. She begins by elucidating some universal themes of friendship – it is good, other-directed, involves reciprocity, carries expectations and obligations, teaches us how to be better persons, and shows us the intrinsic worth of other people.

She then defends the universality of friendship, a crucial section of her argument. After all, a fundamental objection that one could have to *Justice As Friendship* is whether what Dr. Tan calls the 'law of friendship' (p 75) exists. Dr. Tan identifies the forms that these objections could take and addresses each of them.

To an argument that one's own experiences demonstrate that there is no such thing as an ideal friendship, Dr. Tan responds that we can know what ideal friendships are like, even if our relationships are less than ideal – in fact, the frustrations we feel about our present relationships are clues that we have an intuitive perception of what an ideal friendship should be like. To an argument that the idea of friendship varies across time and culture, Dr. Tan responds that in all times and cultures, people would recognize and gravitate towards a relationship marked by the themes of friendship she has described. Any cultural variations of relationships in societies would go towards forming the boundaries of whom one can choose as friends, but do not vary the nature of the relationship that one desires. She perceptively suggests that our skepticism towards the idea of the universality of friendship may be due to a post-modern suspicion that anything can be universal. Her response is worth quoting in full:

"We are suspicious that anything can be universal... But the suspicion is unwarranted when it comes to the most personal of relations – friendship. This is something we all know, which many of us have experienced, and which even the most cynical of us wish to have, but sometimes hold back from – not because we do not assent to the idea of friendship as a good and as a reciprocal relation admitting of obligations, but precisely because we believe in this idea but have been disappointed time and again by our friends, by the way reality fails to meet our intuitive notion of the ideal. But we cannot forget the ideal. We just fear being awakened by the hope of true friendship only to be disappointed again. And in our cynical refusal to settle for anything less, we implicitly continue to affirm the ideal of friendship." (p 69)

Dr. Tan observes that in the best of our friendships, we recognize and fulfil the legitimate expectations of our friends, love our friends as themselves, and enter the friendships for their own sake. She boils down the lessons that friendship teaches down to two broad principles – the principle of legitimate expectations and the principle of intrinsic worth. Through the lens of friendship, we can derive several principles of justice that give specificity to these broad principles – among others, that what is just depends on the particular relationship, that reciprocity is the measure of justice, and that the golden rule which applies in friendship should also apply to law. These norms

governing friendly relationships can be applied to legal relationships – both types of relationships exist on a continuum rather than as distinct categories, and both types of relationships are similar in the sense that they both attract rights and obligations by virtue of the manner in which the parties are situated, rather than by strict consent.

How do these principles of justice apply to the law? Dr. Tan suggests that laws must conform to these principles, and that these principles justify the laws. *Justice As Friendship* can serve as a direct influence on specific laws, and also influence a general theory of liability undergirding an area of law. The theory may mandate a certain choice in some instances, or provide a range of possible laws that comport with the theory. A judge or law-maker may choose any solution within this range, utilising social facts, economic analysis and practical administrative considerations to make one's decision. Applying such considerations is not objectionable in itself - what *Justice As Friendship* requires is a concern for people above the requirements of efficiency, a concern mandated by the principle of intrinsic worth.

Dr. Tan supplies the reader with a plethora of examples describing how *Justice As Friendship* can be applied practically to the law. In the last two chapters of her book, Dr. Tan applies *Justice As Friendship* to contract law and the tort of negligence to show how the theory can both justify the law and guide the development of law in a principled direction. One example used to demonstrate how *Justice As Friendship* can justify the law is the doctrine of frustration. The doctrine of frustration allows parties to treat themselves as discharged from their obligations if an event beyond the control of either party occurs, making performance of the contract impossible or meaningless to the parties. *Justice As Friendship* justifies this doctrine through the principle of legitimate expectations. Applying *Justice As Friendship*, the legitimate expectations of the parties encompass not only what the parties could have reasonably contemplated, but also includes expectations determined by the golden rule. Although the parties may not have envisaged certain events making performance of the contract impossible or meaningless, they would have a legitimate expectation that the other would release them from their obligations should such events materialize. With regard to whether the losses incurred by one party at this stage should be shared or should lie where they fall, *Justice As Friendship* supports the position that both parties should share in the losses – the golden rule would require that there be some sharing of losses if they occurred through nobody's fault.

An example demonstrating how *Justice As Friendship* can develop the law in a principled direction is the duty to rescue in tort law. Presently, the law does not impose a positive duty to render aid to a person in danger or to prevent third parties from harming others, unless there are special relationships between the relevant parties. This position is usually justified by arguments that such a duty would undesirably impose on another's freedom, or that such a duty is not economically efficient, among others. *Justice As Friendship* opposes the first argument by emphasizing that law is not merely based on respect for autonomy – love is also an important theme of law. As for the second argument, *Justice As Friendship* holds that moral arguments should take precedence in justifying law, not economic ones. If moral arguments

affirm a certain position, economic arguments against this position cannot invalidate it. Instead of the present legal position, the application of the golden rule in *Justice As Friendship* may require that “an alleged tortfeasor who comes into contact with the claimant, who is the only source of help, and who can help without danger to themselves or others, be required to help.” (p 169)

Evaluation

As Dr. Tan herself writes, *Justice As Friendship* is a version of natural law theory, as can be seen in its reliance on extra-legal principles to justify the law. Its uniqueness lies in its use of friendship to reveal these extra-legal principles.

This uniqueness is a major strength of Dr. Tan’s theory – natural law theorists usually face challenges proving the existence and content of the objective moral norms which should justify law, especially in today’s skeptical and liberal world. Dr. Tan’s approach deals with these problems by relying on an everyday phenomenon we all have some experience of. Her theory thus offers an accessible heuristic through which people of diverse world views can form a consensus on principles of morality such as the golden rule and the principle of intrinsic worth, principles which were long thought of as universal but are no longer taken for granted today.

Another advantage of Dr. Tan’s theory is that it relies on a universal phenomenon that does not depend on a particular background conception of society to be understood. In contrast, some aspects of Dworkin’s theory, as described in *Taking Rights Seriously* (Harvard University Press, 1978) would not be intuitive to someone not living in a liberal democracy. The priority of rights over goals, as defined in his theory, is drawn from a background conception of a liberal democracy, and may not be intuitive to someone living in a Marxist society, for example. The appeal of Dr. Tan’s theory stretches across political and cultural boundaries, acknowledging the existence of diverse world views and also unifying them in a substantive and meaningful consensus.

That is not to say that there will be no detractors of *Justice As Friendship*. As mentioned above, *Justice As Friendship* hinges on the claim that the norms of friendship as described in the book are universal. However, a detractor who believes that friendship is a purely self-serving tool to boost one’s ego, among other things, may find Dr. Tan’s appeal to intuition and experiences to affirm the universality of friendship’s themes unconvincing. To such a detractor, Dr. Tan could respond that his conception of friendship is warped and is an example of an abuse of the ideal of friendship, rather than proof that the ideal of friendship she describes does not exist.

In addition, although *Justice As Friendship* does not begin from a particular vision of human nature, through its use of the heuristic device of friendship, it does arrive at a certain vision, i.e. that humans are relational creatures who have intrinsic worth. Detractors who disagree with this vision of human nature are likely to disagree with the heuristic proposed by *Justice As*

Friendship as well. For such detractors, *Justice As Friendship* challenges their view of human nature by calling them to reflect upon their actual experiences of friendship. *Justice As Friendship* suggests that even if we outwardly hold to the view that human nature is self-interested or that humans have no intrinsic worth aside from their utility, our intuitive perceptions of how we should treat our friends and how we would like to be treated implicitly affirm an ideal of friendship that contradicts our outwardly-held view. Detractors may choose to explain their desires for deeper and more meaningful friendships as mere personal preferences, or reject the idea that they do indeed have such desires. In any case, at the very least, *Justice As Friendship* should trigger readers to reflect deeply on their most closely-held views.

Dr. Tan anticipates that a detractor may argue that her theory's inability to provide mathematical certainty in adjudication detracts from the usefulness of her theory. Her response is that *Justice As Friendship*'s chief value is in providing a consistent bedrock of principle upon which laws can be justified and to which laws should conform. She also suggests that the fact that *Justice As Friendship* is not algorithmic may simply mean that our fixation on finding clean and neat answers to all questions of law and justice is misguided. A detractor may press the issue by accepting that it is difficult, if not impossible, for any theory to provide mathematical certainty in adjudication, but arguing that what a theory must provide is a degree of objectivity in adjudication for the sake of certainty in decisions, and that *Justice As Friendship* does not prevent judges from applying their own whims, fancies, and preferences in friendship to derive the principles guiding adjudication. To such a detractor, Dr. Tan could respond that judges are not free to impose their own whims, fancies, and preferences because they are constrained by the methodology of friendship, which yields moral principles that people can form an inter-subjective consensus on.

Aside from its contribution to legal academia, Dr. Tan's theory is also of practical import for judges, lawyers, and lawmakers. This fact is amply demonstrated by the beefy sections on tort and contract law at the end of the book, which describe the practical impact of *Justice As Friendship* on areas of law ranging from when a duty of care exists in tort law to the doctrine of implied terms in contract law.

In conclusion, *Justice As Friendship*'s ability to form a substantive consensus on moral norms despite the diversity of world views in today's pluralistic world is a major contribution to legal philosophy. Beyond that, *Justice As Friendship* propels the law towards a vision of society characterised by relationships of selflessness, reciprocity, and love – an ideal that many of us have grown cynical of or have given up entirely, but indeed, an ideal we should not forget.

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